Filed 6/14/16 Ogannesian v. ICC Collision centers CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ALEKSAN OGANNESIAN, Plaintiff and Respondent, v. ICC COLLISION CENTERS, INC., Defendant and Appellant.	G049836 (Super. Ct. No. 30-2013-00635198) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed.

Callahan, Thompson, Sherman & Caudill, Robert W. Thompson, Sheldon Cohen, Sarah E. Christianson; Samini Scheinberg and Bobby Samini, for Defendant and Appellant.

Law Office of Alisa Goukasian and Alisa Goukasian, for Plaintiff and Respondent.

ICC Collision Centers, Inc. (ICC), appeals from an order denying its motion to compel arbitration of the lawsuit brought against it by its former employee, Aleksan Ogannesian. ICC argues the court erred in concluding it waived its right to enforce the parties' arbitration agreement. The argument is unpersuasive.

Because ICC's motion was based not only on the points and authorities and exhibits filed in support of it, but also on "the documents on file in this action," it invited the trial court to consider its entire record in deciding the motion. That invitation was particularly significant because Ogannesian's claim of waiver was based primarily on ICC's extensive participation in the litigation. The trial court agreed with Ogannesian, noting that ICC had waited eight months before filing its motion, a delay the court concluded was "inconsistent with asserting the right to arbitrate."

The trial court's order is presumed correct and we are required to draw all inferences in its favor. And yet the record provided by ICC on appeal includes nothing other than the specific points and authorities and exhibits filed in connection with the motion. The balance of the court file the trial court was invited to consider in making its ruling is not before us. Consequently, we must infer those documents support the trial court's order.

But we need not rely solely on that inference. Ogannesian has moved to augment the record to include a case management statement which appears to contradict a factual claim made by ICC, and ICC has opposed that motion. Apparently, ICC believes that what we do not know cannot hurt it. But that is not the case, given the inferences we are required to draw in favor of the challenged order. Rather, the onus is on appellants to provide us with the entire record relevant to their appeals. We consequently grant the request to augment the record and we affirm the order.

FACTS

According to the trial court's register of actions (included in our record), Ogannesian filed his complaint against ICC in March 2013. ICC filed its answer in April 2013. In July 2013, both Ogannesian and ICC filed case management statements. A jury trial was scheduled for February 2014. In September 2013, ICC substituted in new counsel, and in November 2013, ICC moved to compel arbitration. ICC moved to amend its answer in December 2013, and the trial was continued to April 2014.

ICC's motion to compel arbitration characterizes this action as a lawsuit brought by an employee against his employer, alleging various wage and hour claims. It asserts Ogannesian signed an arbitration agreement "in connection with his hiring" and argues the agreement is not unconscionable and governs the claims Ogannesian asserts. The motion makes no reference to the fact it was filed seven months after ICC filed its answer.

Ogannesian filed his opposition to the motion in December 2013, arguing ICC had waived its right to compel arbitration. Ogannessian noted ICC had known about the arbitration agreement at all relevant times, but did not plead a right to arbitrate as an affirmative defense in it answer. He also pointed out that ICC's motion to compel arbitration came after a trial date had already been set and both parties had engaged in "extensive discovery."

In reply, ICC denied "undue delay" in asserting its right to arbitrate, and claimed Ogannesian was not prejudiced by any delay. ICC acknowledged the parties had engaged in discovery during the litigation, while characterizing that discovery as "limited." ICC also explained that it raised the issue of arbitration shortly after the new counsel it had substituted into the case learned of the arbitration agreement: Specifically, it stated that "[i]mmediately upon discovering through [her] initial investigation that the parties had entered into a binding arbitration agreement . . . , Defendant's counsel

contacted [Ogannesian's] counsel to request that [Ogannesian] agree to submit [his] dispute to arbitration."

ICC disputed Ogannesian's claim of prejudice by relying on the court file — asserting "there have been no motions and no substantial rulings by this court on any issue."

The trial court denied the motion. It stated that "[b]ased on the factors of [*St. Agnes Medical Center v. PacifiCare of California*] (2003) 31 Cal.4th 1187, 1195, plaintiff has met his burden to show the right to arbitrate was waived." The trial court noted ICC waited eight months before moving to compel arbitration, a delay that was inconsistent with its assertion of the right to arbitrate.

DISCUSSION

As ICC notes in its opening brief, "[w]hether a party waived the right to contractual arbitration is a factual question the Court reviews under the substantial evidence standard . . . ." ICC also acknowledges, it is "[o]nly '"in cases where the record before the trial court establishes a lack of waiver *as a matter of law*"'" that the appellate court can reverse a finding of waiver. (*Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1450, italics added.) Consequently, ICC bears a heavy burden in this appeal.

Moreover, because all judgments and orders are presumed correct, it is ICC's burden as appellant to affirmatively demonstrate error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) An aspect of that burden is the requirement to provide this court with an adequate record to use in reviewing the trial court's order. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) And because we draw all inferences in favor of the judgment or order on matters where the record is silent (*Denham*, at p. 564), if the

appellant fails to provide a complete record on an issue raised on appeal, that issue must be resolved against the appellant (*Maria P.*, at pp. 1295-1296).

Here, the record ICC has provided us is woefully inadequate. It is axiomatic that we cannot determine "'"the record before the trial court establishes a lack of waiver as a matter of law"'" (*Adolph v. Coastal Auto Sales, Inc.*, *supra*, 184 Cal.App.4th 1443, 1450), if we do not have that *entire* record before us. And we do not.

ICC's motion to compel arbitration states it is based not only on the points and authorities filed in support of the motion and the arbitration agreement, but also on "the documents on file in this action" — in other words, the entire trial court file. By contrast, the record ICC provided to us consists of only the documents filed in connection with the motion itself, including the points and authorities supporting and opposing the motion, the few documents submitted to the trial court with those points and authorities, and a single declaration filed by ICC's counsel shortly before the hearing. Our record does not even include the pleadings, let alone any other documents in the trial court file that might shed light on the course of the litigation.

And while ICC's opening brief purports to describe in detail what it characterizes as the "limited" discovery conducted in the case, our record contains no evidence on the point. None. As support for its claim, ICC cites to the points and authorities it filed in the trial court, which also describe the discovery. But those points and authorities are not evidence. And with no evidence, we could not possibly conclude, as ICC suggests, that Ogannesian's discovery responses in this case "did not reveal any 'critical facts' [because] the responses he served consisted mostly of objections." Likewise, our record contains no evidentiary support for ICC's claim that it had not "'substantially invoked the use [of] litigation machinery'" prior to moving for arbitration.

Similarly, we have no evidence that would permit us to even consider ICC's claimed "rationale" for its delay in seeking arbitration, which seems to rest on an implicit contention that its prior counsel failed to pursue the issue due to inadvertence or

incompetence. In fact, ICC rather clearly implies that its prior counsel was *unaware* the arbitration agreement even existed. In its reply brief, ICC goes so far as to assert "[t]he record here is devoid of any admissible evidence that ICC knew at the outset of litigation that an arbitration agreement existed."[1] Again, in the absence of evidence — and we have none — we are obligated to draw inferences *against* ICC.

But on that point, we need not rely on inferences alone. After receiving ICC's opening brief, Ogannesian moved to augment our record to include the case management statement filed by ICC in July 2013. Ogannesian explained he did so in response to the assertion in ICC's opening brief that the arbitration agreement had only been discovered after its present counsel substituted into the case. The case management statement, which was filed by ICC's *prior counsel* four months after the complaint, rather clearly undermines that assertion by including a statement that ICC "may file a Motion to Compel Arbitration and Stay Proceeding . . . ."

ICC has vigorously opposed Ogannesian's motion to augment, arguing the motion should be denied because the relevance of this document had already been established at the trial court level, and thus Ogannesian was negligent for failing to ensure its inclusion in the clerk's transcript. Specifically, ICC claims that "[i]n its original motion, just as it does on appeal, ICC contended that *it only learned of* [*Ogannesian*'*s*] *execution of an arbitration agreement after the change in counsel occurred*. Thus, [Ogannesian's] argument that this was 'surprising' [on appeal] is unavailing." (Italics added.)

---

[1] Specifically, ICC defended its delayed assertion of the right to arbitrate by claiming it "took steps to notify Ogannesian of its intent to arbitrate *as soon* [*as its counsel became aware of the arbitration agreement Ogannesian had signed.*" (Italics added.) Notably, there is no evidence that ICC *itself* was ignorant of the agreement to arbitrate. Nor could there be. After all, the agreement was *ICC's agreement* provided to Ogannesian for his signature in 2009 upon commencement of his employment. ICC's apparent failure to advise its own counsel that it wished to arbitrate is further evidence of waiver.

This argument is troubling for two reasons: First, it wholly misunderstands the record preparation obligation, which as we have already explained, is borne by the appellant rather than the respondent; and second, it suggests we should be more concerned about Ogannesian's delay in designating a record than about its own apparent misrepresentation of fact. To be clear, ICC is asking us to ignore the case management statement that was part of the record in the trial court, and which demonstrates its former counsel was well aware of the arbitration agreement, so that it may continue to assert on appeal that the agreement was first discovered *after* it substituted in new counsel. We would not do that even if we agreed Ogannesian had been dilatory in bringing the matter to our attention. The motion to augment is consequently granted.

And because our record, taken as a whole, does not allow us to even consider whether the record before the trial court established a lack of waiver as a matter of law, we also affirm the trial court's order.

DISPOSITION

The order is affirmed. Ogannesian is entitled to his costs on appeal.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.